IN THE UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE FIELD OFFICE

CLAUDIA RAUSCH,	)	EEOC NO. 531-2020-00310X
COMPLAINANT,	)	AGENCY NO. HHS-HRSA-1024-2019
v.	)	
XAVIER BECERRA SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	ADMINISTRATIVE JUDGE ENECHI MODU
	)	July 14, 2021
AGENCY.	)	

AGENCY'S OPPOSITION TO COMPLAINANT'S MOTION FOR CLASS CERTIFICATION

The United States Department of Health and Human Services ("Agency" or "HHS") hereby submits the following opposition to Claudia Rausch's ("Complainant") Motion for Class Certification. For the reasons discussed below, the Agency respectfully requests that Complainant's Motion for Class Certification be denied.

I. ACCEPTED ISSUES IN COMPLAINANT'S INDIVIDUAL COMPLAINT

On December 15, 2020, the Administrative Judge issued an Amended Memorandum Of Initial Status Conference And Order ("*Amended Order*"). ***Amended Order* at 1**. The Order listed the accepted claims in Complainant's individual complaint as follows:

Did the Agency discriminate against Complainant and subject her to a hostile work environment on the bases of sex (female), national origin (Hispanic) and in reprisal for prior EEO activity from 2016 to the present when:

1. During team activities for HHS IDEA spring of 2016, David Horowitz communicated his disagreement in a disrespectful manner;

2. From January 2018 to June 2018, Mr. Horowitz approached Complainant and other women in a disrespectful and threatening manner at the Web CX Agile team meetings;

3. In spring of 2018, Mr. Horowitz scolded Complainant about texting, treated her in a hostile, threatening, and demeaning manner, and referred to her as a millennial;

4. On June 20, 2018, Mr. Horowitz spoke over Complainant at a meeting, dominated the entire meeting, and prevented Complainant from being productive;

5. On January 17, 2019, Mr. Horowitz criticized Complainant in a condescending manner to discredit her work;

6. On August 1, 2019, Mr. Horowitz publicly criticized her at a "Web CX" meeting by making a sarcastic comment, "Sorry, I can't hear you, Claudia was talking;"

7. In April or May 2019, Mr. Horowitz used a condescending tone to criticize Complainant's ability to speak Spanish by stating, "Don't think your Spanish is good enough to get by in Italy;"

8. In April or May 2019, Mr. Horowitz interrogated Complainant about the statements and data Complainant presented at the Web CX Team meeting;

9. On May 14, 2019, Mr. Horowitz yelled at Complainant in front of her colleagues and accused her of double-booking a conference room;

10. On May 9, 2019, Mr. Horowitz denied Complainant's request for pre-approved topics to avoid the rewriting of articles, while he accommodated a male colleague's request;

11. On July 30, 2019, Mr. Horowitz humiliated Complainant after learning that she filed an EEO complaint against him by announcing that she scheduled a meeting to conflict with BHW's All-Hands meeting;

12. On November 6, 2019, her supervisor, Matt Wiley, denied her request to remove Mr. Horowitz from stand-up weekly conference calls as a reasonable accommodation warned her that her behavior was inappropriate and could result in disciplinary action for misconduct;

13. On November 15, 2019, Mr. Wiley accused Complainant of being disruptive for pointing out that she was being treated differently from her White male co-workers, who were allowed to exclude her from team activities;

14. On November 20, 2019, Mr. Horowitz humiliated Complainant about the quality of her work in front of her colleagues while her male coworkers were not treated in such a negative manner;

15. On July 9, 2019, Mr. Wiley charged toward a Russian female in a threatening manner, which alarmed and made Complainant fearful of his behavior;

16. On November 25, 2019, Luis Padilla, Bureau of Health Workforce (BHW) Administrator, refused to provide Complainant the work consideration of excusing her from participating in meetings with Horowitz;

17. On March 24, 2020, Complainant's use of leave was scrutinized by acting first level supervisor, Melissa Moore;

18. In March and April Spring 2020, Complainant's confidential medical documentation was released by Elizabeth Pinkard-Adams, Reasonable Accommodation Accessibility Specialist, to Ms. Moore and other Agency staff without Complainant's authorization;

19. On March 28, 2020, Complainant's managers directed her to turn in an assignment by the next business day, despite her father's COVID-19 hospitalization, after colleagues were told the day before to "take as much time as [they] need" due to the unprecedented pandemic;

20. On or around April 23, 2020, Ms. Moore made an unlawful disability-related inquiry into Complainant's mental-health;

21. On May 6, 2020, Complainant was assigned less desirable work by supervisor Carolyn Nganga-Good at the recommendation of Ms. Moore; and

22. On May 14, 2020, Ms. Nganga-Good made an unlawful disability related inquiry into Complainant's health.

***Amended Order* at 1-2**.

II. PROCEDURAL HISTORY

1. Complainant made initial contact with an EEO counselor on June 26, 2019, and filed the underlying individual formal complaint of discrimination on August 29, 2019. ***Report of Investigation* ("*ROI*") at 51-52**.

2. On June 5, 2020, Complainant filed Complainant's Third Amended Motion For Leave To Amend Complaint ("Third Mot. to Amend") seeking to add numerous claims to her complaint. Specifically, Complainant sought to add a claim of discrimination and harassment when on April 24, 2020, the Agency allegedly misrepresented a medical review by a Federal Occupational Health practitioner in effort to misconstrue Complainant's qualifications for a reasonable accommodation, resulting in a denial of reasonable accommodation. ***Third Mot. to Amend* at 2**.

3. On November 18, 2020, the Initial Status Conference was held in this matter with Complainant, Agency Counsel, and the Administrative Judge in attendance. **See *Complainant's April 6, 2021 Motion to Amend Complaint*** ("***April 6 Mot. to Amend*") at 17**).

4. During the Initial Status Conference, Complainant's numerous amendment requests were discussed in detail by the parties and the Administrative Judge. **Id.**

5. Following the Initial Status Conference, the Administrative Judge issued a Memorandum of Initial Status Conference and Order ("Order"). **Id.; see also *Order***.

6. The Order granted in part and denied in part Complainant's May 6, 2020, and June 5, 2020, Motions to Amend, and the Administrative Judge provided a statement of the accepted issues in this matter. **See *Order*.**

7. The Order listed as accepted bases for Complainant's various claims as sex (female), national origin (Hispanic), and reprisal for prior EEO activity. **Id.** The Order did not reference Federal Occupational Health's policies or practices.

8. On December 15, 2020, the Administrative Judge issued the Amended Order correcting the issues raised by Complainant in her December 14 email to the parties and Administrative Judge. **See *Amended Memorandum of Initial Status Conference* ("*Amended Order*").**

9. The accepted issues listed above reflect the accepted issues contained in the Amended Order.

10. On April 6, 2021, Complainant filed another motion to amend her complaint, seeking to add to her complaint "[t]he multiple claims of denials of reasonable accommodations on the basis of disability, as described in her May 6, 2020 and June 5, 2020 motions" and the new claim that "[o]n February 25, 2021, Christine Collins, Federal Occupational Health Director of Clinical Services ordered FOH staff to delete Complainant's email that contained allegations

that an FOH misrepresented medical review was used to deny a reasonable accommodation."[1] ***April 6 Motion to Amend* at 7-8**.

III. RELEVANT FACTS

1. During the times relevant to Complainant's Motion for Class Certification ("Motion"), Complainant was a Management Analyst, GS-13, Policy and Disputes Branch, Division of Practitioner Data Bank ("DPDB"), Bureau of Health Workforce ("BHW"), Health Resources and Services Administration ("HRSA"), U.S. Department of Health and Human Services ("HHS" or "Agency"). ***ROI* at 126**.

2. On March 12, 2020, Complainant emailed a formal reasonable accommodation request to HRSA's Reasonable Accommodation email box. ***ROI* at 348-51**.

3. Complainant's reasonable accommodation request was processed by HRSA's Office of Civil Rights, Diversity, and Inclusion ("OCRDI"). **See *ROI* at 348-54**. OCRDI is the office within HRSA that provides numerous Civil Rights and EEO services to HRSA employees, including processing reasonable accommodation requests. ***Office of Civil Rights, Diversity and Inclusion***, https://www.hrsa.gov/about/organization/bureaus/ocrdi, (last visited July 14, 2021).

4. On April 2, 2020, Elizabeth Pinkard-Adams, an Accessibility Specialist with OCRDI, requested the Federal Occupational Health ("FOH") conduct a review of Complainant's reasonable accommodation request. **Exhibit 1**.[2]

5. FOH is an agency within HHS' Program Support Center that provides occupational health services within the Federal Government. FOH currently serves more than

[1] The Administrative Judge denied Complainant's motions to amend during a conference call with the parties on June 30, 2021.
[2] The Agency provided Complainant with a copy of this document on March 15, 2021.

300 Federal agencies and reaches approximately 800,000 Federal employees. ***About FOH***, https://foh.psc.gov/about (last visited July 14, 2021).

6. Dr. Neal Presant, an Occupational Medicine Consultant with FOH, provided the medical review for Complainant's reasonable accommodation request. **Exhibit 2**.

7. Ms. Pinkard-Adams served as the decision-maker in Complainant's reasonable accommodation request. ***6-5-2020 - All Attachments***[3] **at 16**.

8. On April 24, 2020, Ms. Pinkard-Adams informed Complainant that her reasonable accommodation request was denied. Ms. Pinkard-Adams explained that, based on the information Complainant provided and Dr. Presant's medical review, she concluded that Complainant was not a qualified individual with a disability. ***6-5-2020 - All Attachments*** **at 16-24**.

IV. MOTION FOR CLASS CERTIFICATION

a. Claims As Class Agent

Complainant now moves for class certification. Complainant's claims as class agent center around the contention that Dr. Presant's medical review was not based on "any objective evidence, clinical or non-clinical; resulting in a completely misrepresented and misstated medical review." ***Mot.*** **at 3**. Complainant contends that (1) Dr. Presant intentionally included false statements in his medical review of her reasonable accommodation request in retaliation for her protected EEO activity, ***Mot.*** **at 12, 28**, and (2) FOH discriminated against her on the basis of disability by failing "to adhere to [applicable Federal] regulations and[healthcare industry] standard policies[, which] resulted in a misstated and misrepresented medical review that misconstrued her qualifications for a reasonable accommodation, misused her health information

[3] Complainant filed this document in FedSep on June 5, 2020.

for malicious purposes, and appears to have made an attempt to disqualify her from her job based on a medical examination that never occurred by FOH." ***Mot.* at 13**.

With respect to FOH's alleged failures to adhere healthcare industry standards, Complainant asserts that FOH failed to comply with Joint Commission standards regarding: (1) documenting a complete medical record using a standardized format to document care, treatment, or services which describes the objective clinical evidence and specific elements of health information that was considered, such as conclusions and impressions from the individual's medical history and physical examination, when forming the medical opinion; (2) timely entering and authenticating documents into a clinical record; (3) reviewing clinical records to ensure that required information is present, accurate, legible, authenticated, and timely completed; (4) the flow of data and information as it enters, circulates within, and leaves FOH; (5) managing and maintaining information privacy; (6) disclosing health information as authorized; (7) protecting health information against unauthorized alteration, disclosure, or destruction; (8) ensuring the accuracy of health information that is entered into medical records; (9) protecting each of the Client Rights under FOH's Client Rights and Responsibilities Doctrine; (10) disclosing to the employee the name of the practitioner responsible for providing services; and (11) obtaining informed consent. ***Mot.* at 9-12**. Notably, Complainant asserts that FOH is accredited by the Joint Commission and, as such, is required to adhere to its policies. ***Mot.* at 9**.

Complainant also asserts that FOH did not comply with numerous Federal regulations in connection with her April 2020 medical review. ***Mot.* at 2-3, 12**. Complainant specifically contends that FOH violated Federal regulations requiring: (1) individual assessments to be based on objective evidence, an individual's work and medical history, and a reasonable medical

judgment that relies on current medical knowledge and/or based objective evidence; (2) disqualification from Federal employment due to a medical condition to be based on reasonable medical judgement, and the duties of the position; (3) Federal agencies to only require a medical examination when it reasonably believes, that there is a question about the employee's continued capacity to meet the medical standards or physical requirements of a position; (4) Federal agencies to treat medical examinations and inquiries as confidential; (5) Federal agencies to have a reasonable safety concern regarding an employee's ability to perform his or her duties before seeking a fitness for duty certification upon an employee's return from leave under the Family Medical Leave Act ("FMLA"); (6) Federal agencies to meet certain requirements when seeking second and third medical opinion regarding medical certification for FMLA leave; (7) medical examinations required by employers upon an employee's return from FMLA leave be job-related and consistent with a business necessity; (8) medical examinations conducted for the purpose of determining medical qualifications for a position consider all documentation supplied by an employee's medical care provider; (9) psychiatric examinations be conducted by licensed mental health professionals under specific circumstances; and (10) Federal agencies to securely store medical records. ***Mot.* at 5-8**.

b. Complainant Relies On Commission Decisions To Demonstrate Class Implications

Complainant relies on published Commission decisions to contend that there are class implications to her claim that FOH's "practice of departing from applicable laws, regulations, and healthcare industry standards" led to discrimination based on disability—namely, "the issuance of misstated and/or misrepresented medical reviews and 'medical opinions' by FOH and other federal sector medical practitioners, that are not based on factual work and medical history or factual medical evidence." ***Mot.* at 13-14**. Complainant alleges that the issuance of

these flawed medical reviews or opinions led to Federal employees being (1) medically disqualified from either Federal employment or assignments, (2) denied a reasonable accommodation, or (3) subjected to unlawful medical inquiries into confidential health information. ***Mot.* at 3-4**. Complainant maintains that this is not an exhaustive list of injuries the proposed class suffered. ***Mot.* at 3**.

According to Complainant, previously published Commission decisions illustrate that Federal employees have been subjected to four types of harm related to FOH. First, Complainant assert that an unspecified number of Federal agencies have used erroneous FOH's medical opinions to medically disqualify and/or terminate numerous employees from their Federal positions. ***Mot.* at 14**. Here, Complainant also questions whether the medical examinations were job-related or based on a business necessity and asserts that the medical opinions were flawed because they were not based on a medical examinations conducted by FOH, and specialists and private physicians provided contradictory opinions. ***Mot.* at 14**. Second, Complainant contends that FOH has improperly interfered with the exercise and enjoyment of rights protected under the Rehabilitation Act by conducting medical reviews that were not based on an employee's health information, and that "are misstated with the intention of disqualifying individuals from reasonable accommodations under the Rehabilitation Act." ***Mot.* at 16-17; <u>see</u> *Mot.* at 14-16**. Complainant also asserts that FOH's practices constituted a failure to engage in the interactive process or to conduct an individualized assessment. ***Mot.* at 17**. Third, Complainant argues that unspecified Federal agencies, in conjunction with FOH, have routinely misused medical information obtained during the reasonable accommodation FMLA leave approval processes to make fitness-for-duty and medical qualification determinations.

***Mot.* at 17-18**. Fourth, Complainant asserts that unspecified Federal agencies regularly misuse fitness-for-duty examinations to retaliate against whistleblowers. ***Mot.* at 18-20**.

c. Defining The Class Members

Complainant seeks to represent (1) all Federal employees from 2009 until present who were denied a reasonable accommodation as a result of their employing Federal agencies' consideration of an FOH medical review that did not allegedly adhere to industry standards; (2) all Federal employees from 2009 until present employees whose benefits, terms and/or conditions of employment were adversely affected when their employing Federal agency took an unspecified action after considering an FOH medical review; (3) all Federal employees whose employing agency will consider an FOH medical review when reviewing a reasonable accommodation request in the future; (4) all Federal employees whose terms and conditions of employment could be adversely affected when their employing Federal agency takes an unspecified action after considering an FOH medical review in the future; and (5) all Federal employees whose medical information was misused when their employing Federal agency requested FOH conduct a medical review. ***Mot.* at 20-21**.

V. LEGAL ARGUMENT

The Commission's regulatory scheme for certifying class complaints is an adaptation of Rule 23(a) of the Federal Rules of Civil Procedure and requires that a class complaint meet the four criteria set out in 29 C.F.R. § 1614.204(a)(2). The purpose of the class-action device is to economically address claims "common to [a] class as a whole . . . turn[ing] on questions of law applicable in the same manner to each member of the class." Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982). Generally, an individual complainant who seeks to represent a class of employees must file a class complaint and undergo pre-complaint

processing procedures in accordance with 29 C.F.R. § 1614.105. However, where a Complainant files an individual complaint, she may move for class certification "at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint." 29 C.F.R. § 1614.204(b).

Pursuant to 29 C.F.R. § 1614.204(a)(2), a class complaint must allege that: (1) the class is so numerous that a consolidated complaint concerning the individual claims of its members is impractical; (2) there are questions of fact common to the class; (3) the class agent's claims are typical of the claims of the class; and (4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2). The proposed class agent bears the burden of proving that the request for class certification meets all four criteria. Felix v. Dep't Homeland Security, EEOC Appeal No. 2020005328 at *7 (April 29, 2021). An Administrative Judge may dismiss a class complaint if it does not meet each of these four requirements or for any of the procedural grounds set forth in 29 C.F.R. § 1614.107. Natalie S. v. Dep't of Defense, EEOC Appeal Nos. 0120180009 and 0120181896 (Feb. 21, 2019) (citing 29 C.F.R. § 1614.204(d)(2)).

a. Complainant's Claims Are Not Actionable Because They Were Not Accepted Issues In Her Individual Complaint

An individual employee may move for class certification as to claims raised in her individual complaint once it becomes evident that the individual claims implicate a class. See 29 C.F.R. § 1614.204(b). Here, Complainant seeks to raise claims not accepted in her underlying individual complaint. Namely, that Dr. Presant intentionally included false statement in his medical review in order to retaliate against Complainant and that FOH's failures to adhere to numerous Federal regulations and Joint Commission standards also caused the erroneous medical review. ***Mot.* at 13-14, 18-19, 28**. As these claims are not accepted issues in

Complainant's underlying individual complaint, and Complainant has not indicated that these newly-raised claims were otherwise raised in a class complaint, Complainant's claims as class agent have not been properly raised.

b. Complainant Failed To Move For Class Certification At A Reasonable Point Once The Reported Facts Indicating Class Implications Became Public Knowledge

Where an employee seeks to represent a class of employees through a motion for class certification, as opposed to filing a class complaint, the employee must move for class certification at any reasonable point in the process once the class implications become apparent. 29 C.F.R. § 1614.204(b); Walker v. U.S. Postal Service, EEOC Appeal No. 0720060005 at *9 (Mar. 18, 2008) (finding that Complainant timely moved for class certification where he filed motion less than 3 months after learning of class implications); Cummings v. Office of Personnel Management, EEOC Appeal No. 01A22203 (May 13, 2004) (holding that Complainant failed to timely move for class certification where she filed motion more than one year after learning of class implications).

Here, Complainant relies on the facts discussed in published Commission decisions to assert that there are class implications for the individual claims she raises in her Motion. ***Mot.* at 13**. The Commission decisions Complainant relies on were published in 2015, 2017, 2018, 2019, January 23, 2020, and February 28, 2020. ***Mot.* at 14-20**. Complainant filed her Motion on May 21, 2021. ***Mot.* at 1**. As the facts Complainant relies upon to argue that potential class members exist became public knowledge over a year before she moved for class certification, she failed to move for class certification at a reasonable point in the process. See Cummings, EEOC Appeal No. 01A22203 (May 13, 2004).

c. Complainant Does Not Have Standing To Bring The Proposed Class Action

29 C.F.R. §1614.107(a)(1) provides for the dismissal of a complaint which fails to state a claim within the meaning of 29 C.F.R. §1614.103. In order to establish standing under §1614.103, "a complainant must be either an employee or an applicant for employment of the agency against which the allegations of discrimination are raised. In addition, the claims must concern an employment policy or practice which affects the individual in his or her capacity as an employee or applicant for employment." Felipa A. v. U.S. Postal Service, EEOC Appeal No. 0120170786 at *1 (March, 3, 2017).

First, Complainant seeks to represent Federal employees employed by potentially numerous Federal agencies. ***Mot.* at 20-21**. Complainant alleges that the proposed class members were harmed when unspecified Federal agency employers improperly (1) denied their reasonable accommodations, (2) made unspecified determinations after considering an FOH medical review that adversely affected an unspecified benefit, term, or condition of their employees' employment, and (3) misused medical information when obtaining a medical review from FOH. ***Mot.* at 20-21**. However, as Complainant is employed by HHS' Health Resources Services Administration, she does not have standing to challenge employment decisions made by other Federal agencies with respect to their employees, even if those agencies considered a medical opinion or review provided by FOH. As such, Complainant does not have standing to represent the proposed class.

Second**,** Complainant's allegation regarding FOH's failures to adhere to multiple Joint Commission standards do not involve an employment policy or practice, which affected Complainant in her capacity as an employee or applicant for employment. The Joint Commission is an independent, non-profit organization that serves as a standards-setting and

accrediting body within the healthcare industry. See Facts About The Joint Commission, https://www.jointcommission.org/about-us/facts-about-the-joint-commission/ (last visited July 14, 2021). Joint Commission accreditation is not mandatory as "[h]ealth care organizations, programs, and services voluntarily pursue accreditation." Joint Commission FAQs, https://www.jointcommission.org/about-us/facts-about-the-joint-commission/joint-commission-faqs/ (last visited July 14, 2021). After voluntarily pursuing Joint Commission accreditation, FOH was only accredited by the Joint Commission from August 2015 to August 2018. FOH was not acting under Joint Commission accreditation when Dr. Presant conducted Complainant's April 2020 medical review. Therefore, as the Joint Commission's voluntary standards pertaining to standards of care in the healthcare industry were not applicable to FOH or the medical review Dr. Presant conducted, Complainant does not have standing to challenge their implementation or lack thereof.

Third, Complainant's Motion challenges FOH's failure to adhere to Federal regulations that are not implicated by Complainant's individual claims. Complainant specifically seeks to challenge FOH's alleged practices of failing to follow various Federal regulations, including those regarding (1) medical disqualifications from a Federal position or employment, (2) the confidential treatment of medical examinations, (3) the secure storage of medical records, (4) an agency employers ability to require medical examinations, (5) seeking a fitness for duty certification upon an employee's return from FMLA leave, and (6) obtaining second and third opinions medical opinion regarding medical certification for leave taken under FMLA. ***Mot.* at 5-8**. However, Complainant does not allege, in either her capacity as proposed class agent or through an accepted issue in her individual complaint, that she was medically disqualified from her position or Federal employment, the Agency improperly subjected to a medical examination,

her medical information was improperly stored, or the Agency acted improperly in reviewing a request for FMLA leave or upon her return from FMLA leave. In fact, Complainant does not allege that she took, or tried to take, FMLA leave. As Complainant does not allege claims impacted by these Federal regulations, she does not have standing to challenge whether they were properly applied. Therefore, as Complainant seeks to represent Federal employees employed by numerous agencies, in a class action that challenges FOH's adherence to regulations and standards that do not apply to Complainant's individual claims, she does not have standing to bring the proposed class action.

d. Complainant Fails To Meet The Regulatory Criteria Required For Class Certification

i. Commonality Does Not Exist Among The Proposed Class Claims

In arguing commonality, Complainant claims that FOH is the centralized decision-making authority for medical reviews used by Federal agencies in reasonable accommodation requests and determining medical employability and that FOH has implemented a central policy that prevents employees from receiving an individualized assessment. ***Mot.* at 26**. As such, Complainant reasons that her proposed class action contains multiple common questions of fact. Specifically, whether Federal employees were discriminated against on the basis of disability when FOH: (1) failed to provide the employing Federal agency with a medical opinion based on objective evidence; (2) failed to provide an employing Federal agency with a medical opinion based on sound medical judgment and current medical knowledge; (3) failed to conduct requisite individualized assessment and medical examinations; (4) provided medical reviews that misconstrued or misrepresented a Federal employee's qualification for a reasonable accommodation; (5) issued a medical review that misstated facts about a Federal employee's medical condition that was used by the employing Federal agency to make a decision that

adversely affected a term and condition of the employee's employment; (6) issued a medical review that misstated facts about a Federal employee's medical condition that the employing Federal agency used to determine that an employee was not able to perform their duties; (7) failed to follow healthcare industry standards when rendering a medical opinion, resulting in the employing Federal agency making a decision that adversely affected the terms and conditions of an employee's employment; and (8) failed to protect confidential medical information. ***Mot.* at 25-26**.

The purpose of the commonality and typicality requirements is to ensure that the class agent possesses the same interests and has suffered the same injury as the members of the proposed class. Complainant v. Dep't of Justice, Appeal No. 0720110008 at *9 (Sept. 15, 2015). Commonality requires that the same agency action or policy affected all members of the class. Felix v. Dep't Homeland Security, EEOC Appeal No. 2020005328 at *7 (April 29, 2021). In determining whether commonality exists, the Commission considers whether "the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact." Complainant v. Dep't of Justice, Appeal No. 0720110008 at *9 (Sept. 15, 2015).

In interpreting Fed. R. Civ. P. 23(a), the Supreme Court has clarified that:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same [employer] that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can

> productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (internal citations and quotation marks omitted); see generally Aurore C. v. Pension Benefit Guaranty Corp., EEOC Appeal No. 0120150342 at *3 (May 18, 2018) (explaining that, though not bound by the Supreme Court's interpretation of Rule 23, the Commission looks to such precedent for guidance).

Here, Complainant does not allege that all of the proposed class members were impacted by FOH's alleged failures to comply with all of the Federal regulations and Joint Commission standards Complainant lists in her Motion. Rather, Complainant appears to indicate that the proposed class would be composed of Federal employees impacted by FOH's failure to adhere to various combinations of the listed regulations and standards. As such, the Complainant fails to allege that the proposed class members were discriminated against by the same FOH practice of failing to adhere to the same standards and regulations.

Next, Complainant does not allege that all proposed class members suffered the same injury. Instead, Complainant appears to allege that the proposed class members suffered a myriad of injuries involving denials reasonable accommodation requests, medical disqualifications from Federal employment or a Federal position, and improperly required medical examinations, fitness for duty certifications, and/or second and third medical opinions before approving FMLA leave. **See Mot. at 3-8, 12-18**. As such, Complainant seeks certification over class of employees who ultimately suffered injuries that vary across the class.

Lastly, Complainant asserts that some of FOH's challenged conduct led to the reportedly discriminatory act of providing decision-makers and other Federal agency employers with erroneous or flawed medical opinions or reviews in the context of reasonable accommodation request, fitness for duty certifications, and medical qualification determinations. ***Mot.* at 3-4**. This contention implicates numerous distinct material questions of fact that are specific to each individual case. Namely, determining the veracity of the numerous distinct medical opinions or reviews provided by FOH personnel would involve an individualized inquiry into the medical information and documentation considered in each individual class member's case. As the process of conducting a medical review or examination and/or forming a medical opinion is highly fact specific, Complainant's contentions challenging the accuracy of those medical opinions or reviews raises material questions of fact that are distinct as to each class member. Therefore, Complainant fails to allege claims that could meet the commonality requirement for class certification.

ii. Complainant's Claims Are Not Typical Of The Class

In her Motion, Complainant argues that her claims are typical of those within the proposed class action because "the FOH opinion utilized in her case made assumptions that were not determined on the scientific standards and established procedures that physicians are routinely required to follow." ***Mot.* at 27**.

Typicality "requires that the claims or discriminatory bases alleged by the class agent be typical of the claims of the class, so that the interest of the putative class members are encompassed within the class agent's claims." Complainant v. Dep't of Justice, Appeal No. 0720110008 at *9 (Sept. 15, 2015). "A class agent must be part of the class she seeks to represent, and must "possess the same interest and suffer the same injuries" as class members."

Id. (internal quotation marks omitted). "Typicality exists where the class agent demonstrates some "nexus" with the claims of the class, such as similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class." Becker v. Dep't Veterans Affairs, EEOC Appeal No. 0120072514 (Mar. 6, 2008).

Here, Complainant does not allege claims as class agent that are typical of the proposed class members' claims. Complainant alleges that (1) Dr. Presant intentionally included false statements and erroneous opinions in his medical review in retaliation for Complainant's prior EEO activity and (2) FOH's failure to adhere to numerous Joint Commission standards and Federal regulations also contributed to the erroneous medical review results Dr. Presant provided to HRSA. ***Mot.* at 13-14, 18-19, 28**. First, Complainant does not allege that any of the proposed class members were retaliated against by Dr. Presant or that Dr. Presant intentionally included misrepresentations in a medical review of their reasonable accommodation claims. Although Complainant does allege that "FOH medical opinions have been used to justify denying or eliminating reasonable accommodations . . . in retaliation for protected EEO activity," ***Mot.* at 15**, this claim appears to assert that other Federal agencies and decision-makers used FOH medical opinions to retaliate against Federal employees, not that FOH personnel deliberately reached inaccurate medical opinions in order to retaliate against an employee. Second, Complainant does not allege that all the proposed class members were denied reasonable accommodations after their employing Federal agencies considered a medical review conducted by FOH personnel. Rather, Complainant suggests that the potential class members were medically disqualified from their Federal jobs or assignments, denied a reasonable accommodation, required to endure unlawful medical examinations and inquiries into confidential health information, subjected to the improper storage of medical records, or forced

to undergo impermissible fitness for duty examination. ***Mot.* at 3-8**. Therefore, Complainant fails to allege individual claims that are typical of the entire proposed class.

iii. Complainant Has Not Ensured Adequacy Of Class Representation

With respect to adequate class representation, Complainant asserts that she is a suitable class agent because she has the healthcare industry expertise to articulate with specificity genuine issues of material fact with respect to allegedly inadequate FOH practices. ***Mot.* at 29**. Complainant also acknowledges that she has not obtained competent and qualified counsel to represent the class. ***Mot.* at 29.**

The adequacy of class representation requirement "simply means that the Class Agent has demonstrated that she, or a designated representative, can fairly and adequately protect the interests of the class." Aracely J. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019003498 at * (Sept. 21, 2020). This is a particularly important requirement as Federal employees are not afforded the opportunity to opt out of class action litigation. Complainant v. U.S. Postal Service, EEOC Appeal No. 0120131866 at *2 (July 2, 2014) (explaining that "[a]n individual complaint that is filed before or after the class complaint is filed and that comes within the definition of the class claim(s)... will be subsumed within the class complaint."). In order to meet the adequacy of representation requirement, a class agent "must show that she is qualified, experienced, and generally able to conduct the proposed litigation." Aracely J., EEOC Appeal No. 2019003498 at *6 (Sept. 21, 2020). However, "[t]he Commission has held that a non-attorney class agent who does not possess the necessary experience, knowledge, or skills to represent a class is not an adequate representative." Id.

Here, Complainant acknowledges that she has not retained competent and qualified counsel to represent the class, but asserts that she is a suitable class agent because she has the

healthcare industry expertise to articulate with specificity genuine issues of material fact with respect to allegedly inadequate FOH practices. ***Mot.* at 29**. Despite Complainant's willingness to conduct research as a pro se complainant, she has not established that she has the necessary experience, knowledge, or skills to conduct the proposed complex class action litigation. Complainant has not demonstrated that she has formal legal training or experience representing individuals in litigation, much less in wide reaching complex class action litigation. As such, Complainant has failed meet the adequacy of representation requirement needed to support class certification.

VI. CONCLUSION

As discussed above, Complainant has not alleged claims that could meet the regulatory requirements necessary to support certifying the proposed class action. Therefore, the Agency respectfully requests that Complainant's Motion for Class Certification, request for preliminary injunctive relief, and discovery be denied.

Respectfully submitted,

/s/ *Alexandra Dixon*

Alexandra Dixon
Attorney, Claims and Employment Law Branch
Office of the General Counsel
General Law Division
U.S. Department of Health and Human Services
330 C Street, S.W., Suite 2100
Washington, D.C. 20201
Telephone Number: (202) 690-2481

CERTIFICATE OF SERVICE

I certify that on July 14, 2021, a true and correct copy of the foregoing **Agency's Opposition To Complainant's Motion For Class Certification** was served upon the below-named individuals by the method indicated below:

Via FedSep and email:

Enechi Modu
Administrative Judge
EEOC Baltimore Field Office
Email: enechi.modu@eeoc.gov

Via Email Only:

Claudia Rausch
Complainant
claudiamarausch@hotmail.com

____/s/ *Alexandra Dixon* _____

Alexandra Dixon
Attorney, Claims and Employment Law Branch
Office of the General Counsel
General Law Division
U.S. Department of Health and Human Services
330 C Street, S.W., Suite 2100
Washington, D.C. 20201
Telephone Number: (202) 690-2481

EXHIBIT 1

From:	HRSA Reasonable Accommodation
To:	Medical Employability (OS/ASA/PSC/FOH); HRSA Reasonable Accommodation
Subject:	FOH Review Requested
Date:	Thursday, April 02, 2020 3:15:30 PM
Attachments:	C. Rausch 0343 GS13 15R587.pdf PMAP2019 - CLAUDIA RAUSCH (1).pdf RArequestFormRevised10-2016.docx Rausch, C FOH MEP Transmittal Form.pdf RE_ Annual & Sick Leave.pdf RA_ SIGNED FOHAuthorizationForMedicalDisclosureForm.pdf 2-21-20 Durrani Letter.pdf PMAP2020 - CLAUDIA RAUSCH.pdf

---

Dear Medical Employability Team,

Please conduct an assessment of the attached request for Claudia Rausch (HRSA-2020-1327) who is seeking reasonable accommodation (RA).

REQUESTED ACCOMMODATIONS

In submitting the request the employee asked for:

1. Communications and Collaborations Modifications: Adjustments to Deadlines
2. Communications and Collaboratons Modicications: Self-paced Workload
3. Leave: RA Based Leave
4. Leave: Approved leave to attend medical appointments
5. Schjedule Change: Late arrivals and Departures
6. Schedule Change: Rest Periods
7. Policy Modificaiton: Removed from triggers (please see attachment RA Reqeust)

DOCUMENTATION FOR REVIEW

- Medical Employability Case Transmittal Form
- RA Request Form
- Authorization for Disclosure of Information
- Medical Documentation
- Position Description
- Performance Plan
- Email Communication

QUESTIONS FOR CONSIDERATION

*The employee has stated to RA staff that her condition is directly connected to harassment by a co-worker.
*The Agency is fully on telework (all employees) due to COVID-19.

1. Does the employee have a qualified disability as defined by the Rehabilitation Act of 1973 and Americans with Disabilities Act Amendments Act (ADAAA)?
2. When did the employee's disability/medical condition begin?
3. Is the employee's disability/medical condition permanent? If not, please explain the employees prognosis, including an estimate of the expected date of full or partial recovery.
4. Please list any scenarios that may exacerbate the employee's disability/medical condition.
5. What job functions would the employee have trouble performing, if any, because of the

disability/medical condition.

6. Is there a clear nexus between the employee's disability and the barriers preventing him/her from performing the essential functions of his/her job?
7. Are the accommodations requested reasonable based on the employee's disability/medical condition in relation to his/her essential job functions as you understand them?
8. Are the requested accommodations likely to be effective in removing the barriers that the employee has indicated in his/her RA request? Please explain.
9. The employee requested to be "removed from triggers" as an reasonable accommodation. Please provide recommendations on how to implement the requested accommodation.
10. Can the employee work a full time schedule and perform his/her specific job duties? Specifically address the essential requirements of his/her position indicated in her position description, paying specific attention to areas of analysis, judgment and interactions.
11. If you are able to make a suggestion, aside from the requested accommodation made by the employee, what alternative accommodation(s) could be equally effective?
12. Based on the information collected from the medical provider is this request disability - based or a report of harassment?

SPECIAL REQUESTS

- Please expedite review of this case.
- If you are unable to communicate with the employee's medical provider or if you need additional information please contact RA-Request@hrsa.gov as soon as possible so that we can work with the employee and/or supervisor to provide you the information needed to complete findings.
- Please submit all findings to: RA-Request@hrsa.gov Please ensure that any communications include case number (HRSA-2020-1327) in the subject line.

We look forward to receiving your findings.

Thank you,

Liz
Elizabeth Pinkard-Adams
OCRDI's Accessibility Team

EXHIBIT 2

PSC | Federal Occupational Health

U.S. Department of Health and Human Services

April 16, 2020

Ms. Elizabeth Pinkard-Adams
Team Lead, Reasonable Accommodation
Health Resources and Services Administration
5600 Fishers Lane
Rockville, Maryland 20857

Tracking#20-11013

Dear Ms. Pinkard-Adams:

This is a letter on the case of Ms. Claudia Rausch, a HRSA employee requesting the accommodations of having her work self-paced with adjusted deadlines, flexible hours, rest periods, and taking sick leave as needed. The medical documentation consists of a letter dated February 21, 2020 from Dr. Adnan Duranni, I also discussed the case directly with Dr. Duranni.

In response to your questions of April 2, 2020:

1. **Does the employee have a qualified disability as defined by the Rehabilitation Act of 1973 and Americans with Disabilities Act Amendments Act (ADAAA)?** The employee does have a diagnosis of attention deficit hyperactivity disorder (ADHD), but it is not clear that this is the major issue behind this request.
2. **When did the employee's disability/medical condition begin?** Dr. Duranni has only been seeing her since November of last year**.** She would presumably have suffered from ADHD since childhood. He has also diagnosed major depressive disorder and anxiety disorder which are both recent since her last several months at her current workplace.
3. **Is the employee's disability/medical condition permanent? If not, please explain the employee's prognosis, including an estimate of the expected date of full or partial recovery.** Her ADHD will be permanent although it may be controlled on the medication that Dr. Duranni has prescribed. Her major depressive disorder and panic attacks are likely to last as long as she is in her current position.

4. **Please list any scenarios that may exacerbate the employee's disability/medical condition.** Interactions discussing her work with her supervisor and co-workers are likely to exacerbate her condition. She is feeling picked-on and unfairly singled out in the workplace. Her condition has been exacerbated to the point that she has indicated to Dr. Duranni that she has had some suicidal ideation.
5. **What job functions would the employee have trouble performing, if any, because of the disability/medical condition?** Because of her ADHD, she may have difficulty performing intense cognitive work with tight deadlines. She may also have difficulty working with her current office team.
6. **Is there a clear nexus between the employee's disability and the barriers preventing him/her from performing the essential functions of his/her job?** The barriers appear to be of an interpersonal nature. Her feeling of being estranged from her office is the major barrier to her being able to work effectively.
7. **Are the accommodations requested reasonable based on the employee's disability/medical condition in relation to his/her essential job functions as you understand them?** As I understand it, her position is cognitive in nature and involves her working both by herself and with others. Laxity with her deadlines to the extent that is administratively possible, may be of assistance in her accomplishing required tasks. Of course, she should be allowed to take sick leave as needed to the extent allowed in the Federal workplace. The requests for flexible hours and rest periods appear to be more related to the panic attacks she feels because of her perceived workplace harassment rather than to the ADHD.
8. **Are the requested accommodations likely to be effective in removing the barriers that the employee has indicated in his/her RA request? Please explain.** The requested accommodations are unlikely to be very effective as long as she believes that she is being treated unfairly in her workplace.
9. **The employee requested to be "removed from triggers" as a reasonable accommodation. Please provide recommendations on how to implement the requested accommodation.** This will be difficult as long as she is in her current workplace. Not assigning her extremely complicated work with tight deadlines, if administratively possible, may be one trigger that can be removed. However, interacting with her supervisor and other co-workers is likely unavoidable.
10. **Can the employee work a full time schedule and perform his/her specific job duties? Specifically address the essential requirements of his/her position indicated in her position description, paying specific attention to areas of analysis, judgment and interactions.** There is nothing to indicate that the employee could not work full time doing similar job duties in a different work environment but it is difficult, if not impossible, in her current workplace.
11. **If you are able to make a suggestion, aside from the requested accommodations made by the employee, what alternative accommodation(s) could be equally effective?** She might be able to work more effectively in a different work setting.
12. **Based on the information collected from the medical provider is this request disability-based or a report of harassment?** While there may be some element

of disability, the overriding issue is perceived harassment. The severe symptoms noted by Ms. Rausch are related to her perception of her treatment in the workplace.

Sincerely,

4/16/2020

X Neal Presant, M.D.

Neal Presant. M.D.

Signed by: Neal L. Presant -S (Affiliate)

Neal L. Presant, M.D., M.P.H.
Occupational Medicine Consultant